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## **CONSEQUENCES OF A FULLY HARMONIZED SALES LAW IN THE EU**

### **Strategy for a Digital Single Market in Europe**

Following the withdrawal of the proposal for a Common European Sales Law (CESL) the European Commission published its strategy for a Digital Single Market for Europe [1] in May 2015 and declared the creation of a digital single market as one of its priorities to enable the digitization of all sectors in the economy and society [2]. For this reason, in December 2015, the first steps were taken to implement the strategy with the drafting of two Directives on certain aspects concerning contracts for the Online and other Distance Sales of Goods (DODSG) [3] and on certain aspects concerning contracts for the Supply of Digital Content (DSDC) [4].

### **The draft directive on certain aspects concerning contracts for the online and other distance sales of goods (DODSG)**

The DODSG is a successor to CESL but differs in two main aspects: While CESL sought a comprehensive settlement of all aspects which could be significant for the direct legal relationship between seller and buyer within a sales contract, the DODSG rules for the determination of the conformity of the goods as well as to the rights of the buyer in case of non-conformity in the digital single market [5]. This restricted control content is countered by the fully harmonizing effect of the draft. Thus, the draft of the European Commission differs not only from the optional approach of the CESL but also from the minimum harmonizing effect of the Consumer Sales Directive (CSD) [6], which should initially replace the DODSG in the area of distance selling [7].

### **Scope of application and expansion**

The DODSG covers the sales contracts concluded between entrepreneurs and consumers in respect of goods. It determines the content of the requirements of the contractual nature of the goods, remedies for non-contractual goods and the way in

which defects can be remedied [8]. This means that not only purchases in online trading but all remote sales contracts are covered.

Despite the restriction on distance sales the European Commission states in the explanatory memorandum of the draft that it is generally open to an expansion to other forms of sales. In this way, divergences between online and stationary trade could be prevented. It could also enable consumers and suppliers to rely on an EU-wide coherent legal framework [9].

The European Parliament is also receptive to such an expansion. As proposed in the draft report of the Committee on the Internal Market and Consumer Protection (IMCO) and in the opinion of the Legal Affairs Committee (JURI) [10] of the European Parliament, IMCO believes that the application of DODSG to in-house trade would counteract the fragmentation of the *acquis* and reduce the transaction costs for companies. Furthermore, the uniform treatment of offline and online trade would prevent a consumer's legal uncertainty arising out of the consumer's different rights depending on whether a sales contract was concluded online or offline [11]. The JURI would advocate an extension only after an appropriate impact assessment and subject to a possible withdrawal of the amendments [12].

### **Consequences of an extension of the scope of application from European and German perspectives**

From a European perspective, an expansion would have a major positive impact. Much of this was taken from the CSD and any differences to the Consumer Rights Directive (CRD) [13] would be offset by the more general scope of application, except for the still arising differences to the distance sale law.

From a German perspective, the avoidance of unequal treatment of stationary trade and remote sales and the accompanying strengthening of the internal market is also welcomed. Nevertheless, a fully harmonizing implementation of the directive extended to any purchase contracts would lead to considerable changes to the applicable standards of the German Civil Code, in some cases even to a lower level of consumer protection and to a greater extent to the burden on entrepreneurs. On the other hand some standards would also be modified to ensure a higher level of consumer protection and through the adaptation of small and medium-sized enterprises to more opportunities on the European internal market [14].

### **Assessment of DODSG and the extension of the scope of application**

The DODSG appears as a step in the right direction for the Commission's strategy to strengthen the digital single market. However, the fact that these rules also achieve the objective of encouraging more companies to offer products to other Member States and to create uniform, fully harmonized rules for consumer rights by means of "*simple and modern rules*" [15] seems doubtful [16].

Companies that have already focused on online sales are faced with a dense set of rules based on EU rules. In addition, companies recently had to adapt to the complex requirements of the CRD. Rather than adding more to all the existing rules, the effort involved should therefore be geared towards verifying that the measures adopted so far have contributed to the attainment of this objective [17].

The divergences in consumer warranty rights would mean that the full harmonizing character of the DODSG would not allow for more favorable national regulations in online trading whereas the CSD would be very well on the stationary trade. A change or partial tightening of the warranty rights only with regard to the right of remedies thus appears inappropriate to produce the effects desired by the European Commission [18].

For these reasons, it is more obvious to create uniform rules throughout the area of sales law as suggested by the European Commission and the European Parliament rather than to further fragmentation of consumer rights [19].

Particularly with regard to the rapidly growing sales model in which all channels are used simultaneously (e.g. pickup in a shop after ordering online or on other remote sales channels) [20] such an expansion appears promising in order to eliminate uncertainties as far as possible. The affected parties, consumers and entrepreneurs, would benefit from such schemes, not only for the remote market, but for all purchase contracts - nationally or internationally. As the reverse of the medal, full harmonization poses the risk of a "race to the bottom" in the legislative process by taking account of the economy and the internal market in the first place, which leads to cuts in consumer protection to make the single European market more uniform. Nevertheless there doesn't seem to be a more suitable way to achieve this goal [21].

### **Result**

In conclusion it can be stressed that the considerations made in the European Parliament in extending the scope of the DODSG are generally useful. The consequences for the European and German sales law are noticeable, but for the most part in a positive way. Even though e.g. whether there is any doubt about the possibility of redressing the burden of proof or the question of whether the consumer is to be given the option to make remedies, or whether there are any doubts, especially from a national perspective, many welcome changes are also to be expected. On the road to uniform rules on the European internal market and the benefits which it entails it will inevitably lead to restrictions on national requirements which on the other hand can be offset. Consumers and entrepreneurs could benefit from the considerations already made when the representatives of the Member States in their deliberations in the European Parliament and the Council take into account an adaptation of consumer and entrepreneurial protection and adapt existing rules instead of adopting completely new ones. This would make the harmonization of the directive less complicated. In any case, the DODSG will probably be doomed to failure without the expansion of the control range.

The legislative process for the drafting directives is still at an early stage and offers great potential for the fact that by means of appropriate amendments and clarifications an instrument emerges which in practice benefits the entrepreneur, the consumer and the lawyer [22]. It remains to be seen in which direction the further deliberations will take place in the committees of the European Parliament and the Council.

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